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in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

CASE NO. 73-500

RAYMOND L. NEWTON, and
GERMAINE C. NEWTON,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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INTRODUCTION

The petitioners here were the defendants in the criminal court and the appellants in the Third District Court of Appeal of Florida. The symbol "Tr." will be used to refer to the transcript of record, and "App." will designate

the Appendix attached. All emphasis is supplied unless otherwise indicated.

The opinion sought to be reviewed is appended hereto (App. 1-8), and reported at 272 So.2d 15.

GROUNDS FOR JURISDICTION

The decision of the Third District Court of Appeal of Florida, which affirmed the petitioners' convictions of second degree murder was filed on January 3, 1973 (App. 1), and rehearing was denied on February 5, 1973 (App. 9). The Supreme Court of Florida refused to review the opinion of the intermediate appellate court by a memorandum order denying certiorari dated May 16, 1973, and an order denying rehearing entered on June 19, 1973 (App. 10-12). These are reported at 278 So.2d 627.

This Court has jurisdiction to review the challenged opinion of affirmance pursuant to 28 U.S.C. §1257.

QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT'S REFUSAL TO PERMIT PETITIONERS' COUNSEL TO IMPEACH THE FORMER TESTIMONY OF A PROSECUTION EYEWITNESS WITH HIS SUBSEQUENT CONTRADICTORY AFFIDAVIT, AND ITS REFUSAL TO PERMIT COUNSEL TO CROSS EXAMINE OTHER EYEWITNESSES AS TO THEIR REASON FOR HAVING CHANGED THEIR TESTIMONY BETWEEN THE FIRST TRIAL AND THE SECOND DEPRIVED PETITIONERS OF THE FAIR TRIAL TO WHICH THEY WERE ENTITLED

CONSTITUTIONAL PROVISION INVOLVED

The petitioners were denied the due process of law guaranteed them by Section 1 of the Fourteenth Amendment to the United States Constitution, i.e.:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The statement of the case may be gleaned, in part, from the opinion sought to be reviewed. To facilitate legibility, those portions will be quoted but not single-spaced:

"These consolidated appeals by Raymond L. Newton (appeal no. 71-1142) and Germaine C. Newton (appeal No. 71-1143), are from their conviction of second degree murder, when tried under an indictment charging them with murder in the first degree. Raymond Newton received a life sentence. Germaine Newton was sentenced to imprisonment for twenty years. * * * "

"Facts the jury was entitled to find from the evidence included the following. The defendant was the owner or operator of a business designated 'Ray's Car Lot.' A half-brother of the victim William Flagler was having some work done on his car there. On Saturday afternoon,

January 10, 1970, the victim and several other persons including his half-brother drove onto the lot. The half-brother got out of the car and remained there. The victim drove away in a manner which resulted in the wheels of his car throwing stones or pebbles which may have struck some of the cars on the lot. Thereupon, in the presence of witnesses who so testified at trial, the appellant Ray Newton told the victim's half-brother, 'Jack, be sure when you get home to tell your brother when I see him I am going to stomp his damned - - - in the ground.' Approximately a half hour after midnight of that day the defendants Ray Newton and his wife Germaine Newton came into the victim's house. Both were armed with shotguns. Present, in addition to the victim and his wife, were a number of their friends. After brandishing his weapon Ray Newton proceeded from the room in which the friends were present into an adjoining room which was a bedroom, and his wife stood in the doorway to that room. On entering the bedroom the defendant Ray Newton shouted: 'Where's William? Where's William?' The victim's wife, who was in or went into the bedroom at that time, answered that he (William Flagler) was not there. On a bed in the room a form (which in fact was William Flagler) lay huddled under the bed clothes. Ray Newton approached the bed with the shotgun and 'pushed twice' against the figure under the covers and the gun was discharged into the figure on the bed. The shot proved fatal to the victim. A witness testified that after the gun went off the defendant Germaine Newton stated: 'That boy is not dead. He got guts,' and then said: 'Let's go, Ray.' Thereupon the Newtons departed.

"Appellants' first two contentions challenge rulings of the trial court involving testimony of a witness, Robert

Lee Green. The trial was the second trial of the defendants under the indictment. On the first trial, which ended in a mistrial, Green had testified as a witness for the state. When the second trial was held Green was in Viet Nam. The state presented the testimony given by Green at the prior trial, as authorized by Rule 3.640(b) CrPR, 33 F.S.A.

"Defendants sought to impeach that testimony by offering in evidence an affidavit containing contradictions of Green's earlier testimony, which affidavit had been made by Green after the first trial and prior to leaving the country."

In that testimony Green swore, inter alia, (1) that defendant Ray Newton broke into the decedent's house just before the homicide (Tr. 399), (2) that Newton then pushed Green into the bedroom (Tr. 400), and (3) that Newton pulled the trigger of his shotgun and thereby caused the fatal discharge of the weapon (Tr. 429-430). Green further testified that defendant Germaine Newton was pointing her gun at the occupants of the house during the foregoing events (Tr. 402).

In his later sworn statement, Green deposed (1) that defendant Ray Newton had not broken into the house (Tr. 808, 818), (2) that he had not been pushed into the bedroom (Tr. 809), and (3) that Ray Newton's hand was not on the trigger of the shotgun, but that the weapon discharged accidentally (Tr. 813-814, 816-817). Green also contradicted his testimony about Germaine Newton when he later swore that she had not pointed her gun at anyone (Tr. 817-818), but held it at "port arms" (Tr. 812).

The State agreed at the trial that the affidavit, supra, was authentic (Tr. 333), but the trial court refused to

permit it into evidence (Tr. 372-377). It appears in the record as Court's Exhibit #1 for Identification (Tr. 805-820).

"Appellants' third contention was stated in the brief as follows: 'Whether the trial court erred in not permitting defense counsel to cross-examine designated prosecution witnesses as to their reason for having changed their testimony between the first trial and the second.'

"One of the eye witnesses to the shooting, L. T. Bowen, who was made a court witness at the second trial, testified that in holding the gun Ray Newton did not have his finger on the trigger of the shotgun but had his hand on the stock some inches to the rear of the trigger. The state, in its examination of the witness brought out that at the first trial Bowen had testified Ray Newton had his finger on the trigger. The appellants argue the court erred by sustaining objections by the state to questions by defendants' counsel to witnesses Leroy Green and L. T. Bowen as to a motive for such different testimony at the two trials. As a proffer defendants' counsel stated that, if permitted to answer, those witnesses would testify that at the time of the first trial the eye witnesses to the occurrence had agreed to make their testimony against the defendant Ray Newton 'as hard on the defendant as possible to show deliberate murder so that the sister, Geraldine Bowen, could obtain money in a lawsuit which was anticipated and pending and not dispensed with.' "

The petitioners here contended in their main brief filed before the Florida appellate court that "(t)he trial court's exclusionary ruling on the attempted cross-examination effectively destroyed (their) constitutional right to confrontation of the witnesses testifying against them."

ARGUMENT

Chambers v. Mississippi, 93 S.Ct. 1038, was decided by this Court on February 21, 1973. It held that the failure to allow cross-examination of a witness to impeach his testimony was a denial of the due process provisions of the Fourteenth Amendment to the United States Constitution (Id., p. 1045):

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499,507, 92 L.Ed. 682 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' "
>
> * * *
>
> "Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of

his alibi, or to 'sift' his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief. Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339-340, 39 L.Ed. 409 (1895). *The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'* Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); Bruton v. United States, 391 U.S. 123, 135-137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g.*, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969)."

Although **Chambers**, supra, is a very recent case, the fundamental importance of the right to impeach a hostile witness is well-established. See **Campbell v. United States**, 373 U.S. 487, 496, 83 S.Ct. 1356, 1362; **Heard v. United States**, 8th Cir. 1919, 255 F. 829, 832.

The State court below, in affirming the trial court's rejection of eyewitness Green's impeaching affidavit, relied primarily upon **Mattox v. United States,** 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (App. 3-4). However, that case involved a situation where the witness who had given the prior testimony was dead, and the defendant sought to show by third parties that the deceased had made statements contrary to his testimony at the prior trial. **Mattox** was not concerned with a sworn testimony **by the witness himself** that he had lied at the first trial, as this case is, supra, p. 5.

Robert Lee Green's former testimony was admitted, if properly at all, as an exception to the rule against hearsay. **Blackwell v. State,** 79 Fla. 709, 728, 86 So. 224, 230 (1920); **Richardson v. State,** Fla.1971, 247 So.2d 296, 300. **Jones on Evidence,** 5th ed., Volume 4, §936, p. 1764, comments:

> "Where the statement to be impeached is a hearsay statement admitted under an exception to the hearsay rule, evidence of contradictory statements may be offered and the rule requiring presentation of the contradictory writing to the declarant has no application. This is particularly true where the declarant, because of death or absence from the jurisdiction, is not available to be called as a witness.

The reason for the rule permitting impeachment of former testimony is perhaps best set forth in a venerable Massachusetts case, **Tucker v. Welsh,** 17 Mass. 160, 167 (1821), viz.:

> "* * * Suppose a witness who has once testified should afterwards acknowledge the falsity of his statements, and then die; the party interested in his testimony might upon another trial prove what he had once said upon the stand under oath; and shall not the other party be permitted to prove that what he said was a falsehood?"

The State court here ignored the inescapable logic of the quoted holding and permitted the State to have its cake (adduce the former testimony of Green), and eat it too (by rejecting Green's contradictory affidavit). The holding in **People v. Collup,** 27 Cal.2d 829, 167 P.2d 714, 717-718 (1946), is compelling:

> "In the instant case the prosecution was enabled to read the transcript of Nelson's testimony given at the preliminary hearing on the basis of a showing (the sufficiency of which we do not decide) that the witness was out of the state. Pen.Code, §686; Code Civ.Proc. §1870(8). The witness was not therefore available to either the prosecution or defendants. The impeaching evidence consisted of statements made by the witness after she had testified at the preliminary hearing and hence could not have been used at the preliminary hearing. The defendants are helpless in meeting the testimony by a method which may refute it entirely or cast serious doubts upon its

> veracity, namely, subsequent contradictory statements or admissions by the witness that the testimony was false. **Justice and fairness compel one of two results, that the testimony at the former trial be excluded or that the impeaching evidence be admitted.** * * *"

In rejecting the instant petitioners' asserted right to adduce testimony indicating **why** two of the eyewitnesses changed their stories between the first trial and the second, the opinion sought to be reviewed observed, in part, that the error was harmless because their testimony at the second trial was less damaging than their earlier version (App. 5-6). The State appellate court thereby overlooked the maxim "Falso In Uno, Falso In Omnibus." The jury might have seen fit to discredit **all** of the testimony by **all** of the eyewitnesses if it had been permitted to learn that they had conspired to, and did, swear falsely at the first trial for pecuniary reasons, supra. p. 6.

> "It is competent to show the motives of a witness to impeach him. Motive may include either the purpose of gratifying the witness' prejudice, bias, hostility, or friendship towards a party, or the purpose of serving his own interest, and may be shown by the proof of specific wrongful acts.
>
> "Corrupt testimonial intent of the witness may always be shown. Hence, it may be proved that there is an existing motive on the part of a witness to give testimony against a party regardless of its truth." * * *
>
> **3 Wharton's Criminal Evidence,** 12th ed., Section 906.

CONCLUSION

That a writ of certiorari should issue to review the subject decision of the Third District Court of Appeal of Florida is, therefore,

Respectfully submitted,

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